Tan Thong Jin v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J-05-79 OF 1997
DENIS ONG, KC VOHRAH AND MOHD NOOR AHMAD JJCA
13 JUNE 2002

Criminal Law *— Dangerous drugs — Trafficking — Presumption — Whether judge had erred in law by using the presumption of possession under s 37(d) to invoke the presumption of trafficking under s 37(da) — Dangerous Drugs Act 1952 s 37(d) & (da)*

Criminal Law *— Dangerous drugs — Trafficking — Exclusive control and custody of the dangerous drugs — Balance of probabilities — House access to others and not only tenant — No exclusive occupation — Whether exclusivity of custody or control of dangerous drugs proven — Dangerous Drugs Act 1952*

A party of police officers made a spot check at Pusat Hiburan Disco 2000 and Karaoke, Jalan Rahmat, Batu Pahat, Johor. The appellant and one Tor Sing Teong ('DW5') were detained and brought back to Batu Pahat Police Station together with the appellant's car for further investigation. On the same day, a search on the car was conducted and nothing was found. However, about ten days later a second search was made on the car in the absence of the appellant and a bunch of keys to a house was found underneath the driver's seat of the car. The appellant had rented the house since February 1993. The landlord retained a room on the top floor as storage for his furniture ('the said room') and locked it. The key to the said room was not given to the appellant. The impugned dangerous drug were found in that room. The learned trial judge was satisfied that the appellant, had exclusive custody or control of the dangerous drug found, which triggered the application of the statutory presumptions under s 37(d) and (da) of the Dangerous Drugs Act 1952 ('the Act') and called for the defence. After hearing the defence, the learned judge concluded that the defence failed to rebut both the statutory presumptions under s 37(d) and (da)(i) of the Act on the balance of probabilities. The appellant was convicted and sentenced to death on a charge of trafficking in dangerous drugs.

Held, allowing the appeal:

(1) The trial judge did not make any finding of a specific fact which depended upon the credibility of witnesses though he made several findings of facts which depended upon inferences drawn from other facts because there was nothing in this judgment or the notes of proceedings relating to the demeanour of witness which indicated that his decision was based on the credibility of the witnesses or as a result of the impression he formed of them. Therefore, the court was more readily inclined to interfere with his findings of fact and form its independent opinion as the court was in as good a position to review and evaluate the evidence of the case as the trial judge (see p 702F–G); *China Airlines Ltd v*

Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 followed. A

(2) The learned judge failed to appreciate that there were other persons who had access to the house, that is to say, the appellant's girlfriend, his friends, his visitor and possibly DW5. Therefore, it was wrong for the learned judge to attach criminal liability, that is to say, exclusive custody or control of the dangerous drug on the appellant merely because he was the tenant of the house (see p 703A–B). B

(3) The police party gained entry into the house by using the bunch of keys found in the car underneath the driver's seat after a second search on the car was made. The search was made in the absence of the appellant. Therefore, it was clear that the bunch of keys was not found in the physical possession of the appellant. The first search on the car was made on the day of the arrest but nothing was found. These facts raised several logical questions leading to inferences, which were pertinent to the defence because the bunch of keys also connected the appellant to the exclusive custody or control of the dangerous drug found in the house. And the reasonable inferences raised were that it was not there when the first search was made but was placed there subsequently by someone else, or it was there from the beginning after DW5 had placed it near the handbrake which escaped the attention of the police during the first search. Both inferences were favourable to the appellant, especially the latter which went to show on the balance of probabilities that DW5 also had access to the house and thus that to a considerable extent had diluted the ingredient of exclusivity in respect of custody or control of the dangerous drugs on the part of the appellant. The learned judge did not consider this point at all (see p 703D–H). C D E F

(4) The learned judge rejected in toto the defence contention that DW5 stayed in the house since ten days before the arrest based on the fact that firstly, no personal effect of DW5 was found in the house and secondly, DW2 only saw DW5 coming to the house twice without entering it. The reasoning for such rejection was not supported by evidence. After a scrutiny of the evidence, the court was of the view that the probability of DW5 staying in the house as contended could not be ruled out completely. Hence, to hold that the story of DW5's stay was a concoction was erroneous (see pp 703I–704A, D–E). G H

(5) The learned judge had erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act thereof to found conviction against the appellant. This was unduly harsh and oppressive. On the facts, the court was satisfied that neither presumption came into play as the appellant had no exclusive custody or control or actual possession as understood in relation to the law on the I

dangerous drug (see p 704E–F); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed.

[Bahasa Malaysia summary

Satu kumpulan pegawai-pegawai polis telah membuat pemeriksaan mengejut di Pusat Hiburan Disco 2000 dan Karoke, Jalan Rahmat, Batu Pahat Johor. Perayu dan seorang bernama Tor Sing Teong ('DW5') telah ditahan dan dibawa balik ke Balai Polis Batu Pahat bersama-sama dengan kereta perayu untuk penyiasatan selanjutnya. Pada hari yang sama, satu carian telah dijalankan ke atas kereta tersebut dan tiada apa yang ditemui. Walaubagaimanapun, lebih kurang sepuluh hari kemudian satu carian kedua telah dijalankan ke atas kereta tersebut dalam ketiadaan perayu dan serangkai kunci kepada sebuah rumah telah dijumpai di bawah kerusi pemandu kereta tersebut. Perayu telah menyewa rumah tersebut sejak Februari 1993. Tuan rumah telah menyimpan sebuah bilik di tingkat atas rumah tersebut sebagai setor untuk perabotnya ('bilik tersebut') dan menguncinya. Kunci bagi bilik tersebut tidak diberikan kepada perayu. Dadah berbahaya yang meragukan itu telah dijumpai di dalam bilik itu. Hakim yang bijaksana berpuashati bahawa perayu, mempunyai hak penjagaan eksklusif atau kawalan dadah berbahaya yang ditemui itu, yang menyebabkan pemakaian tanggapan statutori di bawah s 37(d) dan (da) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan memanggil pembelaan. Selepas mendengar pihak pembelaan, hakim yang bijaksana memutuskan bahawa pihak pembelaan gagal untuk mematahkan kedua-dua tanggapan statutori tersebut di bawah s 37(d) dan (da)(i) Akta tersebut atas imbangan kebarangkalian. Perayu telah disabitkan dan dihukum mati atas pertuduhan mengedar dadah berbahaya.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim perbicaraan tidak membuat sebarang keputusan spesifik yang bergantung pada kebolehpercayaan saksi-saksi meskipun beliau membuat pelbagai keputusan fakta yang bergantung pada inferens yang didapati daripada fakta-fakta lain kerana tidak terdapat apa-apa di dalam penghakiman ini atau nota-nota prosiding berhubung dengan tingkah laku saksi yang mana menunjukkan bahawa keputusan beliau adalah diasaskan pada kebolehpercayaan saksi-saksi atau akibat daripada tanggapan yang beliau bentuk baginya. Oleh itu, mahkamah lebih cenderong untuk mencampuri dengan keputusan fakta beliau dan membentuk pendapat bebasnya kerana mahkamah berada dalam kedudukan yang terbaik untuk mengkaji semula dan menilai keterangan kes tersebut sebagai hakim perbicaraan (lihat ms 702F–G); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 diikut.

(2) Hakim yang bijaksana gagal untuk menghargai bahawa adanya orang lain yang mempunyai akses kepada rumah tersebut, iaitu, rakan wanita perayu, rakan-rakannya, pelawat-pelawatnya dan berkemungkinan juga DW5. Oleh itu, adalah salah bagi hakim yang bijaksana untuk mengenakan tanggungan jenayah, iaitu, hak penjagaan eksklusif atau kawalan dadah berbahaya ke atas perayu semata-mata kerana beliau adalah penyewa rumah tersebut (lihat ms 703A–B).

(3) Pasukan polis dapat memasuki rumah tersebut dengan menggunakan serangkai kunci yang terdapat di dalam kereta tersebut di bawah tempat duduk pemandu selepas satu carian kedua dijalankan ke atas kereta tersebut. Carian tersebut telah dibuat ketika ketiadaan perayu. Oleh itu, adalah jelas bahawa serangkai kunci tersebut telah tidak dijumpa dalam milikan fizikal perayu. Carian pertama ke atas kereta tersebut telah dibuat pada hari penangkapan tetapi tiada apa yang dijumpa. Fakta-fakta ini telah membangkitkan pelbagai persoalan lojik yang membawa kepada inferens-inferens, yang mana adalah penting kepada pihak pembelaan kerana kunci-kunci tersebut juga mengaitkan perayu kepada penjagaan eksklusif atau kawalan dadah berbahaya yang dijumpai di dalam rumah tersebut. Dan inferens wajar yang dibangkitkan adalah bahawa ianya ianya ketiadaan ketika carian pertama dilakukan tetapi telah diletakkan di situ kemudiannya oleh seseorang, atau ianya berada di situ sejak dari mula lagi selepas DW5 meletakkannya berdekatan dengan brek tangan yang telah tidak dapat dilihat oleh polis ketika carian pertama. Kedua-dua inferens memihak kepada perayu, khasnya inferens yang terkemudian yang mana menunjukkan atas imbangan kebarangkalian bahawa DW5 juga mempunyai akses kepada rumah tersebut dan oleh itu bahawa sehingga kepada had yang berpatutan telah mengurangkan sifat eksklusif berhubung dengan penjagaan atau kawalan dadah berbahaya di pihak perayu. Hakim yang bijaksana tidak sama sekali mempertimbangkan perkara ini (lihat ms 703D–H).

(4) Hakim yang bijaksana menolak sama sekali penegasan pembelaan bahawa DW5 telah menduduki di rumah tersebut sejak sepuluh hari sebelum penangkapan berdasarkan fakta bahawa pertamanya, tiada barangan peribadi DW5 terdapat di dalam rumah tersebut dan keduanya, DW2 hanya ternampak DW5 datang ke rumah tersebut dua kali tanpa memasukinya. Alasan bagi penolakan yang sedemikian telah tidak disokong oleh keterangan. Selepas meneliti keterangan tersebut, mahkamah berpendapat bahawa kemungkinan DW5 mendiami di dalam rumah tersebut sepertimana yang ditegaskan tidak dapat ditolak sama sekali. Oleh itu, untuk memutuskan bahawa cerita DW5 adalah hanya rekaan sahaja adalah salah (lihat ms 703I–704A, D–E).

(5) Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dengan menggunakan tanggapan pemilikan di bawah

A s 37(d) Akta tersebut untuk menggunakan tanggapan mengedar di bawah s 37(da) Akta tersebut untuk memutuskan pensabitan terhadap perayu. Ini adalah bersifat keterlaluan dan menindas dengan cara yang tidak wajar. Berdasarkan fakta-fakta, mahkamah berpuashati bahawa tanggapan tidak ada kaitan kerana perayu tidak mempunyai penjagaan eksklusif atau kawalan
B ataupun tidak terdapat pemilikan sebenar sepertimana yang difahamkan berhubung dengan undang-undang ke atas dadah berbahaya (lihat ms 704E–F); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut.]

C **Notes**

For cases on Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 81–91.

Cases referred to

D *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (folld)
Choo Chang Teick v PP [1991] 3 MLJ 423 (refd)
Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor
E [1942] 1 All ER 142 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
Sivalingam a/l Periasamy v Periasamy [1995] 3 MLJ 395 (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (refd)
Watt (or Thomas) v Thomas [1947] 1 All ER 582 (refd)

F **Legislation referred to**

Dangerous Drugs Act 1952 ss 37(d), (da)(i)

Appeal from: Criminal Trial No 47–1 of 1995 (High Court, Muar)

Gurbachan Singh (*Teh Poh Teik & Co*) for the appelant.
G *Vong Poh Fah* (Deputy Public Prosecutor, AG's Chambers) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): The appellant was convicted and sentenced to death on a charge of trafficking in 305.2g of heroin. The charge reads:

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> Bahawa kamu pada 20 Mei 1994, jam lebih kurang 3.15 petang di sebuah rumah No. 35, Jalan Kelapa Bali, Taman Soga, Batu Pahat, dalam daerah Batu Pahat, dalam negeri Johor, telah didapati mengedar dadah berbahaya iaitu 305.2 gram heroin dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39(B) (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di
I bawah s 39B(2) Akta yang sama.

On appeal, we allowed the appeal, quashed the conviction and set aside the sentence.

In this case the learned judge had accepted the prosecution evidence that on 10 May 1994 at about 12.45am a party of police officers led by ASP Mohd Saleem made a spot check at Pusat Hiburan Disco 2000 and Karaoke, Jalan Rahmat, Batu Pahat, Johor. The appellant and one Tor Sing Teong ('DW5') were detained and brought back to Batu Pahat Police Station together with the appellant's car for further investigation. On the same day at the police station a search on the car was conducted and nothing was found. However, about ten days later on 20 May 1994 at 2.30pm a second search was made on the car in the absence of the appellant and a bunch of keys to the house as mentioned in the charge was found underneath the driver's seat of the car. The appellant rented the house from PW3 since February 1993. The landlord retained a room on the top floor as storage for his furniture ('the said room') and locked it. The key to the said room was not given to the appellant. It is in the said room that the impugned dangerous drug was found. There were three rooms upstairs, that is to say, the said room, the master bedroom and another room. On the same day that the bunch of keys to the house was found in the car, at 3.15pm a police party led by SP9 went to the house and entered it by using the keys found earlier in the car. The appellant was brought along. SP9 found that the said room was not locked and noticed that the door knob was damaged. In the said room, the police party found on the sofa a plastic bag which contained the dangerous drug and other items. In another room a weighing machine and an electric plastic adhesive equipment were found in an open cupboard. Nothing incriminating was found in the master bedroom. The dangerous drug was sent for analysis and the chemist confirmed that it was heroin. The learned judge accepted the chemist's findings.

On that evidence the learned judge was satisfied that the appellant, had exclusive custody or control of the dangerous drug found, which triggered the application of the statutory presumptions under s 37(d) and (da) of the Dangerous Drugs Act 1952 ('the Act') and called for the defence.

The defence adduced evidence to the effect that the appellant rented the house for the purpose of intimacy with his girlfriend whom he had brought to the house about three times a week although each of them lived elsewhere. He only used the master bedroom. The said room had been forever locked since the beginning of the tenancy and he was not given the key to it. Ten days prior to his arrest he allowed his friend ('DW5') to stay in the house as the latter was looking for a place to rent. At that time, he was making arrangements for his wedding to his girlfriend, the date of which was fixed on 19 May 1994. He intended to live somewhere else after the wedding. During the period of the stay by DW5, he had never been to the house except on the evening prior to his arrest when he went to pick up DW5 at the house as prearranged without entering the house. DW5 locked up the house and placed the keys to the house near the handbrake of the car after having entered it. With regard to the event on 20 May 1994 when the police party went to the house, the search was first conducted on the ground floor and thereafter the top floor was searched in the respective order, the master bedroom, another room, both of which were not locked, and the said room which was locked and this room was kicked open twice by a member of the police party. DW5 confirmed the appellant's story, in particular, that

A the said room was locked when he stayed in the house. DW2, a neighbour, deposed that she had seen DW5 who came to the house twice but did not enter the house as the appellant was not in. DW3 stated that DW5 came to the appellant's place of work twice and was informed by the appellant that DW5 came because DW5 was looking for a house to rent. DW4, the father of the appellant's girlfriend, confirmed the fact of the intended marriage of B the appellant to his daughter and the purchase of a house for the couple to live after the marriage.

The thrust of the defence is that the appellant was not in possession of the dangerous drug and he did not know how it came to be in the said room, and although he was the tenant of the house DW5 was staying in the house C about ten days prior to the arrest. However, the learned judge, did not accept the truth of the defence story and the reasons advance by the learned judge are as follows:

(i) the fact of DW5's stay at the house ten days prior to the arrest was concocted because firstly, no personal effect of DW5 was found in the D house and secondly, DW2 only saw DW5 coming to the house twice without entering it since the appellant was not in.

(ii) it is not true that the door to the said room was always locked and it was force open by a member of the police party because firstly, SP9 and SP6 denied it and there was no plausible reason for them to lie on the matter and secondly, since SP3 and SP4 denied the dangerous E drug and other items found in the said room as theirs and as the said room was always locked as stated by DW5, how could the incriminating exhibits be found in the said room? This fact also goes to defeat the defence contention that DW5 stayed in the house.

(iii) as a tenant of the house for almost a year, it could not be believed that F the appellant had never entered another room on the top floor of the house where the weighing machine and the electric plastic adhesive equipment were found.

Therefore, the learned judge concluded that the defence failed to rebut both the statutory presumptions under s 37(d) and (da)(i) of the Act on the balance of probabilities. G

It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrust the primary task of evaluation of the evidence. But it is the duty of the appellate court to intervene in a case where the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which H had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Sivalingam a/l Periasamy v Periasamay* [1995] 3 MLJ 395). We make it clear here that the function of making primary findings of fact is confirmed exclusively to the trial court. We do not make findings of fact. We merely review the findings of primary fact made by the trial court. In the exercise, we are alert to what was said by Mohamed I Dzaiddin FCJ (as he then was) in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 at p 518 to the effect that:

(2) It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (see p 527E); *Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 and *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 followed.

(3) However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former (see pp 5271 and 528A-B); *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 and *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 followed.

(4) As the trial judge did not make any specific finding of fact based on the evidence of witnesses and the documents and there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them, the appellate court is in as good a position to review and evaluate the evidence of the case as the trial judge (see p 528G-I).

It is to be emphasized that the conviction was based entirely on the fact of exclusive custody or control of the dangerous drug found in the said room of the house which attracted the statutory presumptions under s 37(d) and (da)(i) of the Act, that is to say, the presumptions of possession and knowledge of the nature of the drug and the presumption of trafficking, respectively which the defence failed to rebut on the balance of probabilities and the exclusivity was founded mainly on the fact that the appellant was the tenant of the house. We are satisfied that the trial judge did not make any finding of a specific fact which depended upon the credibility of witnesses though he made several findings of facts which depended upon inferences drawn from other facts because there was nothing in his judgment or the notes of proceedings relating to the demeanour of witness which indicated that his decision was based on the credibility of the witnesses or as a result of the impression he formed of them. Therefore, we are more readily inclined to interfere with his findings of fact and form our independent opinion as we are in as good a position to review and evaluate the evidence of the case as the trial judge.

Having scrutinized the evidence in its entirety we are of the view that the following matters constitute some of the unsatisfactory features of the case:

(i) The door to the said room was locked when the appellant took up the tenancy and the key to it was not given to him. According to the prosecution, when the police party went to the house the said room was not locked but was shut and that the door knob was damaged. It is apparent from the judgment that based on these facts the learned judge must have inferred that it was the appellant, being the tenant, who had forced open the door to the said room which accounted for the presence

of the dangerous drugs and other incriminating exhibits in the said room. In coming to such inference the learned judge failed to appreciate that there were other persons who had access to the house, that is to say, the appellant's girlfriend whom he took to the house about 3 times a week, his friends whom he took to the house to watch video, his visitor as confirmed by SP4 when she returned to the house to collect the refrigerator and possibly DW5. Anyone of them could have done the same, especially DW5 who was detained under the preventive measures legislation after the arrest for his involvement in drug trafficking. Therefore, it was wrong for the learned judge to attach criminal liability, that is to say, exclusive custody or control of the dangerous drug on the appellant merely because he was the tenant of the house and that SP3 and SP4 denied the dangerous drug as theirs.

(ii) The date of the alleged offence as specified in the charge is 20 May 1994 and the time was about 3.15pm. That is the date and time when the dangerous drug was found in the said room of the house by the police party. Ten days prior this date he was detained by the police and had been in police custody since then including the day he was brought to the house when the dangerous drug was found. The police party gained entry into the house by using the bunch of keys found in the car underneath the driver's seat after a second search on the car was made. As alleged it was placed by DW5 near the handbrake. The search was made in the absence of the appellant. Therefore, it is clear that the bunch of keys was not found in the physical possession of the appellant. The first search on the car was made on the day of the arrest but nothing was found. These facts raised several logical questions leading to inferences which are pertinent to the defence because the bunch of keys also connects the appellant to the exclusive custody or control of the dangerous drug found in the house. Bearing in mind that the bunch of keys was found just underneath the driver's seat which, to our minds, was not difficult to detect the questions raised are, why the keys were not found on the first search? Was it really there on the first search? If not, who had placed it there subsequently? Was it DW5 who placed it near the handbrake or someone else? Why had the police to wait for ten days before the second search was made? And the reasonable inferences raised are that it was not there when the first search was made but was placed there subsequently by someone else, or it was there from the beginning after DW5 had placed it near the handbrake which escaped the attention of the police during the first search. Both inferences are favourable to the appellant, especially the latter which goes to show on the balance of probabilities that DW5 also had access to the house and thus that to a considerable extent had diluted the ingredient of exclusivity in respect of custody or control of the dangerous drugs on the part of the appellant. The learned judge did not consider this point at all.

(iii) The learned judge rejected in toto the defence contention that DW5 stayed in the house since ten days before the arrest based on the fact that firstly, no personal effect of DW5 was found in the house and secondly,

DW2 only saw DW5 coming to the house twice without entering it. With respect we are of the view that the reasoning for such rejection is not supported by evidence. In respect of the former, the learned judge gave undue weight to the fact of non-finding of DW5's personal effect in the house when the investigating officer himself did not think that fact was important as he did not bother: (i) to list out the personal effect recovered by SP11 from the master bedroom in the search list; (ii) to determine the ownership of the personal effect such as the short pants and trousers; and (iii) to ensure their safekeeping otherwise they would not have been misplaced and untraced. And further even the prosecution did not bother to examine both SP9 and SP11 on the issue and DW5 was not cross-examined at all on his personal effect in the house. With regard to the latter, the fact of DW5's visit to the house on the two occasions is not conclusive and sufficient to rebut the fact of stay in the house by DW5 because it lacks in particulars as to the timing of the visits and it is logical to assume that she was not in the house all the times and even then she would not be watching the appellant's house all the times and that by mere coincidence she happened to see DW5 on those two occasions when the appellant was not in. Therefore, the learned judge should have scrutinized the evidence on this issue and accord due weight to it in the face of other relevant evidence. However, on our part, after a scrutiny of the evidence we are of the view that the probability of DW5 staying in the house as contended cannot be ruled out completely. Hence, to hold that the story of DW5's stay was a concoction was erroneous.

(iv) The learned judge had erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37 (da) thereof to found conviction against the appellant. This is unduly harsh and oppressive [see *Mohamed bin Hassan v PP* [1998] 2 MLJ 273]. On the facts, we are satisfied that neither presumption comes into play as the appellant had no exclusive custody or control or actual possession as understood in relation to the law on the dangerous drug.

It is manifestly evident that the learned judge based the conviction solely by inferences from the evidence. In this regard, the caution stated by the Supreme Court in *Choo Chang Teick v PP* [1991] 3 MLJ 423 should be borne in mind. The Supreme Court stated at p 481:

> ... we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant ...

Therefore, having regard to the totality of the evidence we are not prepared to run the risk of sending the wrong person to the gallows. Hence, we decided as we did.

Appeal allowed.

Reported by Peter Ling